CONTRACTS—RESTRAINT OF TRADE—USE OF TRADE NAME.—The plaintiffs, manufacturers of motion picture films, engaged the defendant, an actor of almost no experience, to work for them on contracts from year to year. Each yearly contract provided that he should act under the name of Stewart Rome while employed by the plaintiffs, but that he should never use that name when not acting for them. After three years with the plaintiffs, during which time he became famous as the actor, Stewart Rome, the defendant left for war service. On his return he was engaged by a rival firm and immediately proceeded to act under the name of Stewart Rome. The plaintiffs brought this action to restrain him from using that name. *Held,* that an injunction should not be granted. *Hepworth Manufacturing Co. Ltd. v. Wernham Ryott* (1919, Eng. Ch.) 121 L. T. Rep. 226.

The decision in the instant case was based on the ground that the contract was void as an illegal restraint of trade. Contracts not to use a firm name have been loosely classed as not in restraint of trade. *Vernon v. Hallam* (1886) 34 Ch. D. 748. But it is clear that the purpose and the effect of such a contract is to restrain trade, whatever the device used. The real holding is that it is not an *illegal* restraint of trade. The same seems to be true of the instant case. The question is whether such a restraint is illegal. The accepted rule is that a contract in partial restraint, like that in the instant case, must be unreasonable before it will be held illegal. *Maxim-Nordenfeldt Gun Co. v. Nordenfeldt* [1893] 1 Ch. 630, [1894] A. C. 535; *Harrison v. Glucose Sugar Refining Co.* (1902, C. C. A. 7th) 116 Fed. 304. Similar considerations lie at the root of the rules on agreements to obtain contracts from the government. See (1919) 28 YALE LAW JOURNAL, 502. Certain kinds of contracts are held reasonable or unreasonable "as a matter of law." Covenants not to use a firm name, mentioned above, are one class almost analogous to that in the instant case. But it is evident that the defendant's covenant, not being made to protect a sale of good-will, is not sufficiently similar to justify a classification with such contracts; for in the instant case, unless the defendant uses the name Stewart Rome, it will be of no benefit to anyone, whereas, in the sale of good-will, the name is in constant use. Another type of contract, similar to the one in the instant case, is that of the physician's assistant not to practice in the vicinity of the physician who has instructed him. Such contracts are held valid, probably in order not to discourage such instruction. *Freudenthal v. Espey* (1909) 45 Colo. 488, 102 Pac. 280. In the instant case, the employer has incurred expense in training the actor, in marketing the productions, in advertising, and in building up a reputation for the actor. The question is, therefore, whether the actor shall be kept free from a condition of servitude or the employer shall be protected in his investment. If the instant case be followed, the training of actors might be discouraged, since the employers would not be protected, as are the doctors in the above mentioned cases. Nevertheless, the principal case has taken what seems the preferable view. It is to be noted that the defendant's contract, unlike the physician's assistant, prevented the use of the name Stewart Rome anywhere.

EVIDENCE—EXPERT TESTIMONY—BASIS.—The plaintiff sued to recover damages for blindness, alleged to have been caused by an electrical flash which was the result of the defendant's negligence. A certain physician had examined the plaintiff after this suit was instituted, but had never treated him. He was permitted to testify, as an expert witness, that the plaintiff was totally blind in his left eye, basing his opinion, in part, upon the statements which the plaintiff had made to him. *Held,* that the admission of this evidence was error. *Bell v. Milwaukee Electric Ry. & Light Co.* (1919, Wis.) 172 N. W. 791.

The weight of authority requires that the facts upon which an expert's opinion

is based shall be stated or appear in evidence before his opinion is given. *Raub v. Carpenter* (1902) 187 U. S. 159, 23 Sup. Ct. 72; *Williams v. Philadelphia Rapid Transit Co.* (1917) 257 Pa. St. 354, 101 Atl. 748. The basis for this rule is that the jury will thus be enabled to determine whether or not the facts upon which the opinion is predicated are correct, and to permit other experts to pass on the same facts. But it has been indicated that the rule rests upon an incorrect theory and usurps the province of cross examination. See (1917) 26 YALE LAW JOURNAL, 502. Most jurisdictions exclude, as hearsay evidence, statements to a physician during an examination if made in order that he will be able to testify. 3 Wigmore, *Evidence* (1905) sec. 1721. However, an opinion partly based on the statements of the injured person as to present symptoms is generally admitted. 1 *ibid.*, sec. 688. But not if based entirely on such statements, when they are made out of court. *People v. Ebanks* (1897) 117 Calif. 652, 49 Pac. 1049. It is submitted that the conclusion reached in the principal case is not desirable. It is probably the result of combining the rule requiring the facts upon which the expert opinion is based to be stated, with the rule excluding, as hearsay evidence, statements made during an examination to a physician for the purpose of securing his testimony. But the latter rule did not apply, because such statements, when given as the foundation of an opinion, do not have hearsay quality. *Chicago, R. I. & P. Ry. v. Jackson* (1917, Okla.) 162 Pac. 823. The strict enforcement of the rule of the principal case would practically prohibit expert testimony in such cases, because the statements of the patient, as to present symptoms, at least, are a necessary element of the expert's opinion.

EVIDENCE—FOOTPRINTS—WHEN ADMISSIBLE TO PROVE IDENTITY.—In a trial for murder the county attorney was permitted to testify that he had seen footprints near the scene of the killing, that he had requested the defendant to show him his boots, and that, in his opinion, the tracks were made by the defendant's boots. *Held,* that the evidence was too indefinite and its admission was error. *Burkhalter v. State* (1919, Tex. Cr. App.) 212 S. W. 163.

Footprints are a species of "identity evidence." When offered to show that an act must have been done by some human being, there can be no doubt as to their admissibility. *State v. Daniels* (1904) 134 N. C. 641, 46 S. E. 743; see *Leonard v. State* (1907) 150 Ala. 89, 93, 43 So. 214, 216. But when offered to show that an act must have been done by a particular human being, the rule of admission narrows. At best, such evidence requires an indirect mode of inference, since "rarely can one circumstance alone be so inherently peculiar to a single object." 1 Wigmore, *Evidence* (1904) sec. 411. An actual measurement of both shoe and footprint or a physical comparison by super-position is usually required. *Ballenger v. State* (1911) 63 Tex. Cr. Rep. 657, 141 S. W. 91; *State v. Harrold* (1866) 38 Mo. 496. The opinion of the witness as to the identity is inadmissible. *Dubose v. State* (1906) 148 Ala. 560, 42 So. 862; *State v. Green* (1893) 40 S. C. 328, 18 S. E. 933; but see *State v. Ancheta* (1915) 20 N. M. 19, 27, 145 Pac. 1086, 1088. When the witness is the maker of the shoes his opinion is admissible on the ground, it would seem, that it is expert testimony. *Newton v. State* (1912) 65 Tex. Cr. Rep. 87, 143 S. W. 638. There is a conflict of authority as to when the procurement of such evidence violates the defendant's immunity from self-incrimination. When the defendant voluntarily submits to the comparison, as in the principal case, there is clearly no violation. *Webb v. State* (1914) 11 Ala. App. 123, 65 So. 845; *State v. Sirmay* (1912) 40 Utah, 525, 122 Pac. 748. But when he is coerced or ordered to submit to the comparison, the evidence has been held inadmissible. *Elder v. State* (1915) 143 Ga. 363, 85 S. E. 97; see *State v. Sirmay, supra,* 536. However, the better view is that the immunity from self-incrimination extends only to testimonial utterances. *State v. McIntosh* (1913)